

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ROCKWELL'S RESTAURANT CORP.</b>	:	SMALL CLAIMS DETERMINATION DTA NO. 819581
for Revision of a Determination or for Refund of	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 2002 through	:	
August 31, 2002.	:	

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Petitioner, Rockwell's Restaurant Corp., 97 Brookby Road, Scarsdale, New York 10583, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2002 through August 31, 2002.

On December 30, 2004 and January 7, 2005, respectively, petitioner, Rockwell's Restaurant Corp., appearing by its president, Stephen Robins, and the Division of Taxation, by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by April 29, 2005, which date commenced the three-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Presiding Officer, renders the following determination.

***ISSUE***

Whether petitioner has established any basis warranting the cancellation of penalties and interest imposed on a statutory Notice and Demand pertaining to the sales tax quarterly period ended August 31, 2002.

***FINDINGS OF FACT***

1. Petitioner, Rockwell's Restaurant Corp., owned and operated restaurants known as Rockwell's American Restaurants. Stephen Robins was petitioner's president, sole officer and shareholder.

2. For the sales tax quarterly period spanning June 1, 2002 through August 31, 2002, petitioner filed its quarterly sales tax return (Form ST-810). This return reported gross sales of \$1,060,224.00, and sales tax due in the amount of \$71,562.69. Such amount was reduced by claimed tax credits and advance payments of \$47,680.11, to arrive at tax due in the amount of \$23,882.58. This amount was further reduced by a claimed vendor collection credit of \$150.00, to arrive at a total amount due of \$23,732.58. Petitioner submitted with its return a check drawn on its account with the Bank of New York, dated September 20, 2002 and payable to New York State Sales Tax, in the amount of \$23,732.58.

3. The Division issued to petitioner a Notice and Demand for Payment of Tax Due (Assessment # L-022042393-8), dated February 24, 2003 and pertaining to the sales tax quarterly period ended August 31, 2002. The computation section of this Notice and Demand reflects that the Division did not challenge the amount of tax reported as due by petitioner (\$71,562.69). However, the notice reflects that petitioner's tax credits and advance payments totaled only \$22,674.81 (pertaining to the month of July 2002), rather than the \$47,680.11 claimed on petitioner's return. The notice also reflects that the September 20, 2002 check in the amount of \$23,732.58 was returned as unpaid by the Bank of New York. Accordingly, after reducing the uncontested amount of tax due (\$71,562.69) by the amount of tax credits and advance payments made (\$22,674.81), a balance of tax due remained in the amount of \$48,887.88. To this amount the Division added penalty for failure to pay self-assessed tax on or

before the due date and interest. The Division also issued to petitioner a Warrant, docketed July 16, 2003, demanding collection and payment of the tax, plus accruing penalty and interest, as set forth on the foregoing Notice and Demand.

4. On July 29, 2003, petitioner challenged the Notice and Demand by filing a petition with the Division of Tax Appeals, seeking a hearing at which to establish the existence of reasonable cause for abatement of the penalty imposed. In his affidavit, petitioner's representative, Stephen Robins, makes clear that petitioner does not dispute the amount of tax assessed or that the same is due and owing, but rather seeks only the abatement of penalty and interest.<sup>1</sup>

#### ***SUMMARY OF PETITIONER'S POSITION***

5. Petitioner maintains that its difficulties began as early as late 1997 and early 1998 when Mr. Robins faced personal and marital difficulties which left him unable to focus his attention on petitioner's business affairs. As a consequence, several checks in payment of sales and use tax for a number of periods during the years 1998 through the period in issue were returned for insufficient funds, leading ultimately to the issuance of collection notices for several of such periods. Petitioner sought to obtain a deferred payment arrangement with the Division and also submitted applications for amnesty for several periods preceding the sales tax quarterly period at

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<sup>1</sup> Petitioner claimed in the petition that it never received the notice regarding the quarter ending August 31, 2002. However, since the tax in question was self-assessed but unpaid, the Division correctly assessed the same, plus penalty and interest via a Notice and Demand, and was not constrained to do so within any particular period of limitation on assessment. Further, by his affidavit, petitioner's representative acknowledges that the Division provided proof that the notice was, in fact, issued. In addition, the petition itself specifically references the notice in question here by its Assessment I.D. # L-022042393-8. The petition was filed on July 29, 2003, approximately five months after the date of the Notice and Demand, and some two weeks after the warrant was docketed. Assuming that petitioner did not receive actual notice of the assessment until such July 16, 2002 warrant docketing date, the petition was nonetheless clearly filed within 90 days thereafter and would be considered timely filed (*Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228, *lv denied* 79 NY2d 759, 584 NYS2d 447). The Division, for its part, does not contest petitioner's right to challenge the notice in question and its imposition of penalty and interest, nor does it contest the timeliness of such challenge in this forum. Accordingly, petitioner's claim that it never received the notice is of no consequence.

issue herein (the amnesty program period only extended to sales and use tax liabilities up to February 28, 2001 [*see*, L 2002 (ch 85, part R, § 1 [b]))).

6. Petitioner maintains that Mr. Robins's marital and personal difficulties and his inability to focus on petitioner's business caused a number of bad business decisions to be made and, in conjunction with the Division's issuance of collection notice and warrants, caused a number of petitioner's vendors to raise prices, require cash payments for goods and services, initiate collection lawsuits and limited petitioner's ability to borrow funds, operate its business or sell assets to meet financial obligations. Petitioner submitted documentary evidence pertaining to periods prior to that at issue herein, and asserts that the Division's failure to allow a deferred payment arrangement with respect thereto, and its failure to expeditiously grant petitioner's application for amnesty for such earlier periods, resulted in ongoing financial difficulties which compounded and carried over into the period at issue herein, allegedly resulting in the failure to pay in a timely manner.

### ***CONCLUSIONS OF LAW***

A. As noted, petitioner does not contest the tax assessed for the quarterly period at issue herein, but rather seeks only abatement of penalty and reduction or abatement of interest. Without diminishing the personal and alleged resulting business difficulties petitioner faced prior to the period in question, including the payment failures for such prior periods, it remains that petitioner has simply failed to demonstrate a cause for its delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay in paying sales and use taxes for the period at issue.

B. In establishing reasonable cause for penalty abatement (or interest reduction), the taxpayer faces an onerous task (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29,

1993). The Tribunal explained that “[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]” (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992).

C. Petitioner’s claim that the Division failed to provide it with the option of a deferred payment arrangement with regard to periods prior to that at issue in an allegedly timely manner does not establish reasonable cause for its delay in paying ongoing taxes for the period in question, nor is there any evidence showing that the late payment and nonpayment for the period in issue was inadvertent or attributable to oversight. Finally, there is no statutory basis for the abatement of ordinary interest, nor has petitioner established reasonable cause for its delay in payment of tax for the quarterly period in issue so as to support abatement of penalty interest.

D. The petition of Rockwell’s Restaurant Corp. is hereby denied and the Notice and Demand dated February 24, 2003 is sustained.

DATED: Troy, New York  
July 14, 2005

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/s/ Dennis M. Galliher  
PRESIDING OFFICER